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# The Caroline Affair in the Evolving International Law of Self-Defense

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LAWFARE
BOOK REVIEW

# *The Caroline Affair in the Evolving International Law of Self-Defense*

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Review of Craig Forcese, *Destroying the* Caroline: *The Frontier Raid that Reshaped the Right to War* (Irwin Law, 2018)

The story of the *Caroline* goes roughly like this: In the darkness of night on December 29, 1837, an expedition of Canadian militia, under the authority of Great Britain, crossed the Niagara River to the U.S. shore where the American steamer *Caroline* was docked. Rebels fighting the Canadian government were encamped nearby, and the vessel had been used by sympathetic Americans to transport supplies and arms to the group. The Canadian raiding party set the *Caroline* ablaze and untied it from its moorings. Strong river currents quickly took the crumbling vessel over Niagara Falls. Subsequent public accounts were exaggerated and contradictory, but probably one American was killed during the raid and resulting firefight.

Mutual diplomatic recriminations ensued and border tensions ran high for years. The U.S. side saw the raid as a flagrant, unprovoked attack against a neutral state. The British and Canadian side justified it as necessary to deal with security threats that the United States could not or would not deal with itself (or in today's international parlance, the United States was unwilling or unable to neutralize the threat emanating from its territory). Moreover, the state of New York put a British subject on trial for murder arising from the raid, incensing the British government and public; the American federal government took the position that it did not have legal authority to intervene or order him released. At several points over the years of the dispute, war between the United States and Great Britain became a live possibility. Diplomatic efforts, taken over in 1841 by U.S. Secretary of State Daniel Webster and a new British envoy to the United States, Lord Ashburton (Alexander Baring), produced agreement on the law, and agreement to disagree on the facts. Soon thereafter the border issues were largely resolved by the Webster-Ashburton Treaty.

Today, the *Caroline* incident is often thought of as a seminal international legal

episode about anticipatory self-defense. Webster's statement on behalf of the United States, and Ashburton's agreement with this part, that a state must show "*a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation*," is frequently invoked for the proposition that a state may use proportionate force in self-defense against "imminent" threats. Although many international lawyers and scholars probably know the outlines of the story above, there is a rich and complex history surrounding the *Caroline* incident. These include, among others, the historical context of the insecure border areas of Canada and the United States that gave rise to rebellion among some Canadians and support for them among some Americans; the raid on the *Caroline* itself; reasons why the incident burned so furiously in public opinion in both Britain and the United States, even to the point of creating a serious possibility of war; the indictment and trial of British subject under British command who (accounts differ) took part in the raid and who was individually charged with murder in connection with it; the American federal government's apparent lack of legal authority to end or remove the New York criminal case; and the already deep and complex economic relationships between Britain and the United States that might have been severely damaged by long-run tensions or outright war.

This history, with its many strands, is explored by University of Ottowa law professor Craig Forcese in his excellent new book, "Destroying the *Caroline*: The Frontier Raid That Reshaped the Right to War." It's a story that has been told before; among those I have relied on are John E. Noyes's chapter in "International Law Stories," which focuses on the legal dimensions, for example, and Kenneth Stevens's book, "Border Diplomacy: The *Caroline* and McLeod Affairs in Anglo-American-Canadian Relations, 1837-1842," which focuses on the affair's international political dimensions.

Forcese's book brings in rich, new historical details mined from archives and, moreover, provides additional understanding of the international legal context in which the *Caroline* affair took place. This includes a discussion of murky nineteenth-century thinking about the law of military force below the threshold of war, as well as the United States' own assertions of self-defense in earlier forays into Spanish-held Florida. (In 1817–18, the shoe was on the other foot, as the United States justified military incursions of Spanish territory on the grounds that Spain was failing to prevent British, Indian, and other enemies from threatening the United States from havens across their border.)

"Destroying the *Caroline*" also weaves the account of international law on the resort to force in the mid-19th century as it was understood in that period together with the story of the *Caroline* doctrine's influence and use—as well as misuse—by states and international lawyers in contemporary debates about the use of force. Because the book is part history, part analysis of contemporary debates, and part links between them, it does not simply proceed chronologically. For that reason, it can sometimes feel like the analytic and narrative thread is jumping around; a virtue of this approach, however, is that the book's organization makes it easy to pull specific chapters to study carefully on their own.

One takeaway is that the *Caroline* episode "is remembered by chance, and not design" (p. 4). The book helps to at least somewhat explain how such a modest military incident takes on such grand international legal significance. Part of that story is the peculiar chain of citations to the episode, including misunderstanding of its facts. Part of that story also is the personalities involved. Although the raid on the *Caroline* occurs in December 1837, it is not until nearly five years later that Webster and Ashburton have their now-famous exchange. That time lag is

important. In the immediate aftermath of the attack, international negotiation over the matter fell mostly to a pair of diplomatic mediocrities, U.S. Secretary of State John Forsyth and British Ambassador to the United States Henry Steven Fox. Had the matter been resolved quickly, it is unlikely that the incident would ever have taken on such international legal influence. It took the great intellectual, diplomatic, and legal firepower of their much more esteemed replacements—combined with the timing of their respective governments' revitalized desire to resolve transatlantic friction—to help provide some authoritative clarity regarding the customary law of the resort to military force.

Another takeaway is surprise that the *Caroline* has come to be associated today with customary state practice regarding *anticipatory* self-defense. After all, by the time of the raid, the insurgents using the vessel (who included many Americans) had crossed the Niagra River from New York and occupied a piece of Canadian territory. From there, they had shelled the Canadian mainland and shipping on the river. These developments arose weeks before the Caroline raid, and more insurgents and weapons were continuing to arrive. As Forcese says, the *Caroline* "is most easily viewed as an effort to degrade a weeks-old attack and its expansion, rather than as an attempt to forestall the first blows of a not-yet mounted assault" (p. 228). Yes, a standard for anticipatory self-defense can be *extrapolated* from Webster's formula, but the actual facts were not a clean case of it. I confess to this error in my own past descriptions of the *Caroline*. "This repurposing of the *Caroline* in discussions of anticipatory self-defence," Forcese reckons, "is astonishing" (p. 227). He is altogether correct.

In light of the heavy contemporary reliance on Webster's formula, including for anticipatory self-defense, Forcese uses the last part of the book to revisit the implications of the *Caroline* affair for recent debates about preemption, imminence, unwilling or unable standards, and related concepts. (It perhaps bears mentioning that what we think of today as the contemporary debate over "unable or unwilling" took place in the diplomatic correspondence over the *Caroline*, right down to the exact words: "The [American] authorities," wrote Sir George Arthur to Lord Glenelg in 1838, "were either unable or unwilling to prevent aggression against Canada.") Forcese does not try to propose clear resolutions to ongoing controversies, but instead tries to consider various modern arguments in light of the basic considerations that Webster and Ashburton wrestled with. In that effort I agree with his skepticism of rigid formalism and his conclusion that Webster's formula itself need not be read as a bright-line rule, but instead can be read to accommodate more flexible standards.

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Forcese is Canadian, but (especially as an American reader) I was reminded what an interesting U.S. foreign relations law story the *Caroline* affair is. The role of international law in courts during the episode is covered in other works like those I cited earlier, but Forcese's history highlights some important U.S. constitutional war powers dimensions, too.

Scholars of constitutional war powers naturally focus on wars. From that perspective, the 1830s are not a very interesting period. The United States fought a declared war in 1812 and launched military expeditions in the southeast soon after, and then it fought a declared war against Mexico in 1846. In between, relations along the U.S.-Canada border don't seem to offer much. But the *Caroline* incident could very well have escalated to war and, as I've argued elsewhere in relation to the president's

"power to threaten war," constitutional war powers are just as much about wars that didn't take place, especially when war didn't take place because of a successful threat.

In fall of 1841, according to Forcese's research, Gen. Winfield Scott—a hero of the War of 1812—assessed the risk of escalation to another war against Britain at 50 percent. Although, as Forcese notes, this figure may be significantly overstated, the dangers were quite real. He details how senior British officials, from the prime minister on down, at several points over this years-long saga were fairly convinced that war might be imminent.

Possible escalation scenarios included local American public pressure to retaliate; the possibility that New York state officials might prosecute and, if convicted, execute a British subject suspected of having participated in the *Caroline* raid; or that vigilantes from that New York area might assassinate one. Forcese details some steps along these precarious paths, including the 1840 prosecution of Alexander McLeod, a British military veteran arrested and charged with an American death that had occurred in the assault on the *Caroline* three years earlier. He was ultimately acquitted, but had he instead been convicted and executed, war with Britain would perhaps have been unstoppable.

By the time McCleod was acquitted by a New York jury, both the New York state trial court and the New York state *habeas* court had rejected the international law argument—an argument advanced by both the British and the U.S. federal governments—that McLeod, like any soldier, was immune from such personal liability for a public act in service to his sovereign. The takeaway for Britain and foreign sovereigns was, in effect, that America's federal government was not master of its own house in the conduct of its foreign affairs. The reputational harm was considerable. This prompted Congress to extend the *habeas* statute to allow federal courts to consider similar claims in the future.

More broadly, the federal system was at this time showing some strains in assuring foreign sovereigns of its adherence to international law. It exhibited other weaknesses in assuring peace, too. Soon after the raid, for example, President Van Buren dispatched Gen. Scott to the northern border—ostensibly to defend the U.S. from further incursions, but mostly to help suppress direct support by Americans for the Canadian rebels. Van Buren wanted Scott to reinforce American neutrality.

Scott had few regular, federal troops to work with, however. Most of those in national military service at that time were tied up fighting the Seminoles in the South or guarding the western frontier. In instructing Scott to therefore make use of the militias of the northern states, Secretary of War J.R. Poinsett warned the general to enlist, as much as possible, only those "exempt from the state of excitement which the late violation of our territory has created." In other words, not only was Scott forced to rely on state militia forces that he knew were far inferior to federal regulars, some of those state militia forces were likely to be especially unreliable because of their dubious loyalty to the strict federal policy of neutrality. On top of that, Scott lacked statutory authority to do much with military forces in any case.

Fifty years after the Constitution was drafted, the *Caroline* incident turned on its head certain important assumptions and reasoning by some of the Framers as to what was likely to lead to war and what, by contrast, was likely to induce peace. Many of those who would eventually be called "Republicans" worried that creating a powerful national military establishment would make the United States more prone to war. But the *Caroline* affair is a chapter of American

history in which the weakness of the national military establishment created serious risk of war. That same national military weakness, moreover, made it difficult for the United States to comply with the international law of neutrality – in considerable part from the inability to compel its own citizens to comply. In this case, a weak national military establishment resulted in greater, not lesser, risk to the Framers' desire that the United States be viewed a respectable member of the community of nations.

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